

**STATEMENT OF
COMMISSIONER GEOFFREY STARKS,
DISSENTING**

Re: *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311.

One of our primary responsibilities at the Commission is to ensure that spectrum, a scarce public resource that underscores our broadcasting industry and our wireless communications, is distributed equitably and in the public interest. However, spectrum is not the only public resource integral to the deployment of our communications networks. Access to public real estate and property is similarly critical. Specifically, public rights-of-way managed by states and municipalities fuel the build-out of our networks. Providers need access to this resource to dig trenches to lay conduit and reach homes.

For many decades, state, municipal, or local governing bodies have been recognized as the arbiters of the use of this valuable public resource. This recognition formed the basis of the Cable Act,¹ which spawned our local franchising rules and allowed providers to come freely to local franchising authorities to negotiate the use of public rights-of-way. Historically, LFAs have sought and cable providers have agreed to a fee for the use of this public property, along with other public interest terms. In return, providers have been able to run profitable businesses, acquiring new customers and reaping hundreds of billions of dollars in revenue.

I dissent from today's item because it threatens the ability of states and municipalities to manage their local affairs through an improper reading of the statute. The expansive and unprecedented reading of the term "franchise fee" in today's item significantly devalues the use of public rights-of-way and could, within months, threaten settled and longstanding franchise agreements across the country. In doing so, it puts at risk the careful balance developed over many decades between the interests of providers and the local communities that they serve.

Thousands of federal, state, and local leaders have submitted substantive comments in our docket, pointing out how our action today will frustrate other important goals of the statute, and target certain terms negotiated into franchise agreements that are of great importance to local communities.² From free or discounted services to schools or government buildings, to institutional networks, or I-Nets, which are viewed as critical infrastructure by many cities and relied upon to support government functions and public safety communications, much is at stake. Additionally, the item itself recognizes that it will shake the very foundation of another statutory priority, the provision of public, educational, or governmental, or PEG, stations, which the item notes provide critical and unique local service to communities across the country.³

¹ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

² See, e.g., Letter from Sen. E. Markey *et al.*, to Ajit Pai, Chairman, FCC (July 29, 2019); Letter from Sen. K. Gillibrand and Sen. C. Schumer, to Ajit Pai, Chairman, FCC (July 25, 2019); Letter from Sen. C. Van Hollen, to Ajit Pai, Chairman, FCC (June 12, 2019); Letter from Rep. Y. Clarke, to Ajit Pai, Chairman, FCC (May 9, 2019); Letter from Sen. M. Hirono, to Ajit Pai, Chairman, FCC (Dec. 18, 2018); Letter from Rep. G. Moore, to Ajit Pai, Chairman, FCC, at 2 (Dec. 14, 2018); Letter from Rep. E. Engel, to Ajit Pai, Chairman, FCC (Dec. 13, 2018); Reply Comments of CAPA *et al.* at 9; Comments of King County, Washington, at 9; City Coalition Comments at 17-18; Comments of NATOA *et al.* at 10.

³ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Draft Third Report and Order, para. 50 (adopted Aug. 1, 2019) (*Third Report and Order*).

Perhaps the most significant departure in today's item is the expansive new reading of the term "franchise fee" for the purposes of the statutory cap on LFAs' collection of such fees. The term will now broadly include "cable-related, in-kind contributions."⁴ This new interpretation of the statute will upend decades of settled regulatory determinations and innumerable franchise agreements currently in place across the country, and cause a seismic shift in the relationship between LFAs and providers, maximizing providers' leverage and minimizing the ability of LFAs to secure adequate service to their local communities.

The Commission's unilateral decision to avoid the words and intent of our statute and expand the definition of "franchise fee" in this proceeding is puzzling. As numerous commenters have extensively noted, and I agree, our mandate seems clear.⁵ Section 622 of the Act caps franchise fees at five percent of a cable operator's gross revenues from the provisioning of cable services.⁶ The term "franchise fee" is given a relatively straightforward definition in the statute: "any tax, fee, or assessment of any kind."⁷ And, if the plain meaning of the words used raised any question about whether we are talking about money or some other type of contribution, the legislative history included a strikingly clear clarification: "[i]n general, this section defines as a franchise fee only monetary payments made by the cable operator and does not include as a 'fee' any franchise requirements for the provision of services, facilities or equipment."⁸ On this issue, it is exceedingly clear – we are talking about money.

It is true that the Sixth Circuit returned this issue to us on procedural grounds with dicta considering whether the term "franchise fee" can include "noncash exactions" in narrow instances.⁹ However, in almost the same breath the Court noted, notwithstanding its brief exploration of the definitions of the words at issue, "[t]hat the term 'franchise fee' can include noncash exactions, of course, does not mean that it necessarily *does* include every one of them."¹⁰ The item's reliance on that brief discussion to support today's line-drawing exercise, in the face of a clearly worded statute and clearly stated congressional intent, is inappropriate.¹¹

What does this really mean for communities across the country? It means that freely negotiated franchise terms, agreed to by cable providers in addition to franchise fees, in arm's length negotiations with LFAs all across the country, will almost immediately be treated differently now than they have for 35 years. And as a result, the value of local public rights-of-way will be immediately diminished limiting the ability of local authorities to raise revenue and support important programs. At its core, this means that difficult choices will need to be made by local leaders, contrary to the public interest, due to the Commission's misreading of the statute. For instance:

⁴ *Third Report and Order* at paras. 13-15.

⁵ See, e.g., *NATOA et al.* July 24, 2019 *Ex Parte* at 2; *Anne Arundel County et al.* July 24, 2019 *Ex Parte* at 8; *Comments of City of Philadelphia et al.* at 22 (Nov. 14, 2018); *Comments of Charles County, Maryland*, at 7 (Nov. 14, 2018); *Reply Comments of Anne Arundel County, Maryland et al.*, at 6 (Dec. 14, 2018).

⁶ 47 U.S.C. § 542.

⁷ *Id.* § 542(g)(1).

⁸ 1984 U.S.C.C.A.N. 4751, 4753; H.R. Rep. No. 98-934 at 65 (1984) (emphasis added).

⁹ *Montgomery County, Md. et al. v. FCC*, 863 F.3d 485, 490-91 (6th Cir. 2017).

¹⁰ *Id.* (emphasis in original).

¹¹ *Id.*

- The City of Medford, Massachusetts told us that they will need to decide whether to “divert resources away from core municipal and school services to maintain existing PEG programming, suffer a dramatic reduction in the scope of PEG channels, or lose them altogether.”¹²
- Durango, Colorado worries that reductions in funding will likely mean its PEG channels will be cut altogether, leaving the city without a way to warn citizens when a disaster strikes. PEG channels were used to alert citizens when 3 million gallons of mining sludge leaked into a major river which flows through the middle of the town. A PEG station’s drone was used to obtain video and track the progress of the spill by local emergency management officials. Later, PEG channels were used to advise of evacuations and road closures when a massive wildfire broke out nine miles north of the city. Reductions in funding will likely mean PEG channels will be cut all together, leaving the city without a way to warn citizens when a disaster strikes.¹³
- I was in New York City earlier this week meeting with city officials and was told that they worry greatly about the impact of today’s item on the future of the city’s I-Net, a network that has become so integral to city services that it will be nearly impossible to replace. FDNY uses the I-Net for “critical public safety communications” among other things, and every city agency is plugged into it in some fashion.¹⁴

Our record is clear: the services negotiated in local franchising agreements are incredibly important, and reflect the significant value associated with permission to use public rights-of-way. When it comes to PEG channels, I can’t say it any better than the item already does: “A significant number of comments in the record stressed [the benefits of PEG stations], which include providing access to the legislative process of the local governments, reporting on local issues, providing a forum for local candidates for office, and providing a platform for local communities—including minority communities.”¹⁵ Free or discounted service to cash-strapped schools, provision of critical I-Nets, discounts to vulnerable communities – all of these franchise terms advance the public interest and are a small imposition given the value received by providers in franchise negotiations. Our action today is unnecessary, unsupported by law or precedent, and risks causing grave harm to local communities.

In short, today’s item jeopardizes the public interest and threatens to significantly alter the ability of state and local governments to determine how best to serve their communities. This item will undoubtedly end up back in litigation, and I believe the court will find that the majority’s decision is at odds with clear congressional direction. I dissent.

¹² Letter from Stephanie M. Burke, Mayor, City of Medford, MA, to Ajit Pai, Chairman, FCC (July 25, 2019).

¹³ Association of Washington Cities *et al.* April 3, 2019 *Ex Parte*.

¹⁴ City of New York July 25, 2019 *Ex Parte* at 1.

¹⁵ *Third Report and Order* at para 50.